

Future of whaling vis-à-vis Japan's withdrawal from IWC

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Japan conducted its first successful commercial whale hunt on July 1, 2019 since [thirty years](#), against significant resistance from the international community, after it had formally withdrawn from the International Convention on the Regulations of Whaling (ICRW) in December 2018 by exercising the 'opting out' clause. The recommencement of hunting poses pertinent questions for international law:

What legal impact will the withdrawal have on the work of the International Whaling Commission (IWC) as the only international organization dedicated to whale conservation? Does Japan now have a free hand in hunting these marine species? Or are there international obligations other than those enshrined in the ICRW which prohibit or limit Japan from expanding their commercial whaling activity?

The IWC Regime: A Proactive Beginning

The whaling regime under the Convention on Whaling of 1946 with 88 state parties provides for three types of whaling: commercial (at present, zero 'quotas'), aboriginal sustenance (indigenous) whaling and scientific whaling. In 1982, the IWC mandated that there should be an embargo on commercial whaling of all whale species and populations (known as 'whale stocks') from the 1985/1986 season onwards. This embargo is often referred to as the 'Commercial Whaling Moratorium' and [it remains in place](#) today.

When the IWC moratorium went into effect in 1986, Peru, Japan, the Soviet Union and Norway registered legal objections to the Moratorium. Peru and Japan withdrew their objections shortly thereafter, bowing to political pressure. At the time, Japan used to hunt about 300 minke whales a year from the Antarctic Ocean, under the Scientific Research Program while Norway hunted between [200-300](#) North Atlantic minke whales for commercial use.

Many [conservationists](#), [legal scholars](#), and [some governments](#) viewed Japan's 'scientific' whaling as a sham- a thinly veiled commercial whaling operation conducted [under the banner of science](#). In the [Whaling in the Antarctic](#) case in 2014 while deliberating on whether Japan's programme qualified as commercial whaling, the ICJ hinted that Japan's whaling practice may violate international law when it opined that if neither whaling activities were for scientific purposes nor aboriginal subsistence whaling, they must be in violation of the zero-catch limit.

At the 67th IWC meeting in September 2018, both of Japan's current Special Permit (whaling) Programmes ([NEWREP-A](#) and [NEWREP-NP](#)) were evaluated. The evaluating commission held 'that both programmes had failed to provide sufficient scientific evidence that justifies the need for lethal sampling'. The recommendations

of the Commission, although non-binding, did 'represent an informed view of the Commission on the [scientific merit](#) of the research' programmes.'

Furthermore, IWC's prohibitions on commercial whaling became a driving factor for including 'all great whales' on Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora to [further deter](#) the commercial use of whale stocks. In October 2018, the Standing Committee (SC) of the [CITES concluded](#) that Japan had [failed to comply](#) with certain CITES provisions pertaining to trade listed in the Appendix I species (namely, Sei whales).

In December 2018 the IWC received a notification that the [Government of Japan](#) will withdraw from the ICRW in 2019. The Chief Cabinet Secretary of Japan announced that Japan would resume commercial whaling from 1st July 2019 in its Territorial Sea and Exclusive Economic Zone but cease whaling activities in the Antarctic Ocean and the Southern Hemisphere. Yoshifumi Kai, Head of the Japan Small-Type Whaling Association averred that there was nothing wrong with Japan's whaling exercise when asked to [comment](#) on the anti-whaling protests. Consequently, Japan will be deprived of the right to continue with scientific whaling—in accordance with Article 8 of the Convention—not only in the Southern Ocean, but also in the Northwest Pacific.

Violation of the United Nations Convention on the Law of the Sea (UNCLOS)

Because it will forfeit all rights under ICRW, there is a risk that Japan could be [charged with the violation](#) of the United Nations Convention on the Law of the Sea (UNCLOS). One of the sacred objectives enunciated in the Preamble of the UNCLOS, with due regard to the sovereignty of all States, is that there be equitable and efficient utilization of their resources by States including the conservation of their living resources and preservation of the marine environment as provided in [Art. 192](#). This obligation contains no qualification and has attained the status of customary international law. Therefore, countries like Japan and Norway will have to be cautious while carrying out the whaling because whales are considered to be a '[highly valued group of species](#).' The term 'marine environment', used in Art. 192, includes the ocean as a whole, without distinguishing marine spaces under and beyond national jurisdiction, as per [Yoshifumi Tanaka](#).

Furthermore, States are to cooperate on a global basis and through appropriate organisations and also to comply with the standards laid down within the convention (Art. 197). Generally, the conservation of living marine resources within a nation's Exclusive Economic Zone is a matter of national jurisdiction, whereby the coastal state is free to set the '[allowable catch](#) of the living resources' in its EEZ, as guided by the '[best scientific evidence](#)' and the goal of '[maximum sustainable yield](#), as qualified by relevant environmental and economic factors.' Even though Art. 192 does not prohibit whaling in the EEZ, it does mandate the States to restrict the practice and continue engaging with 'appropriate organisations' like IWC.

The UNCLOS deals with marine mammals in Arts. 64, 65 and 120. States are to cooperate in the 'conservation, management and study' (Art. 65) of whales, in particular by working through 'appropriate international organizations'. States

should cooperate in the given manner to conserve highly migratory species (Art. 64) and cetaceans (Art. 65). These obligations constitute norms of customary international law and the current opting-out clause in ICRW undermines these norms to a large extent. The ICRW was recognized in 1992 by [Agenda 21](#) as an ‘*appropriate international organization*’ for cetaceans pursuant to the requirements contained in Article 64 of UNCLOS. Even Iceland, a pro-whaling nation, was of the opinion that in the absence of an alternate ‘*appropriate international organization*’, it was [obligated to comply](#) with IWC regulations pursuant to Article 65, regardless of a nation’s status as a member of the IWC. While regional organizations like North Atlantic Marine Mammal Commission (NAMMCO) and Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS) also focus on whaling practices, only the ICRW ensures both the conservation and the sustainable management of whales at a [global level](#). Japan, therefore violates Art. 64, 65 and 120 of UNCLOS by opting out of the only international organisation (IWC) for the regulation of whaling activity. It remains to be seen if an UNCLOS State party will start a [dispute settlement](#) procedure under UNCLOS – which allows nations to enforce IWC violations against one another – against Japan.

Violation of the Duty to Protect the Environment?

Japan’s commercial whaling activity may also violate its duty to protect the environment and the no harm rule under international environmental law. States are primarily obligated, as part of a customary law as held by the ICJ in the [Nuclear Tests Case](#) to ensure that activities within their jurisdiction do not cause harm to the environment of other States. In this regard, the ICJ’s mandate on ‘due diligence’ and ‘no harm rule’ have to be adhered to by States to prevent their territory from being used for acts [contrary to the rights](#) of other States. Numerous conventions [Convention on Biological Diversity art.3; Rio Declaration on Environment and Development; United Nations Conference on Environment and Development] require States to be responsible sovereigns and avoid harm to others. Responsibility is imposed on states for damage or loss to highly migratory fish stocks ([Art. 35](#)). The Highly Migratory Species include all kinds of whales ([UNCLOS Annex. 1](#)). Whales are of immense importance as the [apex predator](#) of the food chain and any disruption in this food chain can cause devastating effects on the marine environment across all territories. Most [deep-sea fisheries](#) are unmanageable, because of the characteristics of deep-sea species – long life spans, late maturity, slow growth, and low-fertility, thus making whales particularly vulnerable to overfishing. Japan’s whaling occurs in a shared resource and the harm which accrues to the other States makes it liable. Hence Japan will have to keep this principle in mind ‘even when exploiting whales in its own jurisdiction. Beneath the no harm rule, Japan’s whaling practice is also concerning with regard to the [Principle of Intra-generational Equity](#). The principle calls for states to ensure a just allocation in the utilization of resources between past, present and future generations. It cannot be snubbed by Japan.

Effect On IWC And Its Activities Post Japan’s Exit

Beside the question of a violation of international law, one may question what impact Japan’s withdrawal will have on the IWC regime. The book, ‘The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments’

states that the participation in the ICRW does not include nearly two-thirds of the world's coastal states. Owing to the opting-out clause, in addition to commercial whaling occurring outside of IWC's supervision, whaling might be practiced by IWC members that have lodged [official objections](#) to the moratorium. As per Article V in the original convention that established the commission, objecting member states are not held to standards contained within amendments to which they have objected. Iceland and Norway currently host commercial whaling operations under this provision. This withdrawal may give such pro-whaling nations an impetus to opt out of the Convention, if no liabilities are imposed on them under conventional and customary law. The opting-out seems to give a blow to this idea of State cooperation through IWC communicated through the UNCLOS. Additionally, IWC member states may host other kinds of whaling operations besides commercial: [aboriginal subsistence whaling](#), operations targeting species not explicitly protected by the Commission (mainly smaller toothed whales and dolphins, collectively referred to as [small cetaceans](#)), and [scientific permit whaling](#)—the last was the basis of Japan's [previous excuses](#).

Conclusion

Japan's withdrawal does not necessarily threaten the efforts of IWC but the exit certainly raises questions about the ability of States to overcome disagreements regarding whaling in the international arena. States may carry on deliberations under UNCLOS and Convention on Migratory Species during these trying times. Regional agreements may prove to be more fruitful, including CITES and Convention on Biodiversity. Countries cannot escape the consequences of a violation of international obligations, such as [an emerging erga omnes norm](#) for the protection of the environment.

It remains unclear whether the new commercial whaling industries will be able to pump the demand for whale meat. Post World War II, its popularity witnessed a sharp decline. Pro-whaling associations have attempted to increase the marketability of whale meat across the nation's borders but have succeeded only partially owing to shifting consumer preference and greater environmental awareness. With only outdated equipment, barely any capital and aged whalers, local whaling might not prove to be a success. Hence the worst fears of environmentalists and anti-whalers might not materialise at all. Japan, meanwhile, continues to be an observer state at IWC which may aid in re-igniting its conscience to resort to sustainable whaling measures in the future.

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